IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO. 1232 OF 1995.

1. M/s. A. F. Ferguson & Company,
Chartered Accountants,
A Partnership Firm registered under
the Indian Partnership Act, 1932,
Having its Head Office at
Allahabad Bank Building, Bombay Samachar
Marg, Bombay - 400 001.

2. Mr. Rangaswamy Subramaniam,
Senior Partner,
M/s. A. F. Ferguson A Company
Having his Office at
Allahabad Building, Bombay Samachar
Marg, Bombay - 400 001.

3. Mr. Y. M. Kale, Partner,
M/s. A. F. Ferguson & Company,
having his office at Maker Towers,
"E", Cuffe Parade, Bombay 400 005.

4. Mr. V. Swaminathan, Partner,
M/s. A. F. Ferguson A Company
Having his Office at
Allahabad Building, Bombay Samachar
Marg, Bombay - 400 001.

5. Mr. B. P. Shroff, Partner,
M/s. A. F. Ferguson & Company,
having his office at Maker Towers,
"E", Cuffe Parade, Bombay 400 005.

6. Mr. K. M. Powvala, Partner,
M/s. A. F. Ferguson A Company
Having his Office at
Allahabad Building, Bombay Samachar
Marg, Bombay - 400 001.

7. Mr. F. M. Chinoy, Partner,
M/s. A. F. Ferguson A Company
Having his Office at
Allahabad Building, Bombay Samachar
Marg, Bombay - 400 001.

versus.

1. The State of Maharashtra.

2. Mr. R. K. Prabhu, Senior
Inspector, Shops & Establishments,
Municipal Corporation of Greater
Bombay, having his office at
"A" ward Municipal Corporation
of Greater Bombay.

Shri. J. P. Cama, Senior Counsel with Shri. Ganesh S. Shetty i/b M/s. Crwford Bayloy & Company for the petitioners.

Shri. A. A. Kumbhakoni, Associate Advocate General.

Shri. D. S. Mhaispurkar, APP for the respondent no.1.

Shri. R. T. Walawalkar i/b Ms. T. H. Puranik for the respondent no.2.

CORAM: S.B.MHASE, &
S.R.SATHE, JJ.

DATE : May 5, 2006.

Oral Judgment (Per S.B.Mhase,J.):

1. The petitioners have invoked the jurisdiction of this Court under Article 226 of the Constitution of India challenging the provisions of Section 2(4) of the Bombay Shops and Establishments Act, 1948 and the Bombay Shops and Establishments Amendment Act, 1977 in so far as they seek to include the establishments of "Accountants" within the definition of "commercial establishment" and thereby prayed for declaration that the provision is unconstitutional. The petitioner has also prayed for a writ of certiorari, or writ in the nature of

certiorari or order or direction calling for the records and proceedings of the Criminal Case No. 53/SEM/1995 registered before the Metropolitan Magistrate, Esplanade Court and after going into the legality, validity and propriety of the same to quash the criminal Case No. 53/SEM/95 registered against the petitioner Nos. 2 to 7.

2. Initially the petition was filed as against the respondent nos. 1 & 2. However, by order dated 18th October, 1996 passed in Criminal Application No. 1556 of 1996, the Audit Employees Union, (a Trade Union registered under the provisions of the Trade Unions Act, 1926) was added as a respondent No.3. But by order dated 11.12.2004, in view of the by consent minutes of order between the petitioner and respondent no.3, the name of respondent no.3 was deleted. The said minutes of order were accepted by this Court by order dated 11.12.2004. Thus, it is clear that the respondent no.3 Audit Employees' Union is not a party to this proceeding, though at one stage it was joined as a party - respondent.

3. Petitioner no.1 is a partnership firm of the Chartered Accountants registered under the

Indian Partnership Act, 1932 having its head office at Allahabad Bank Building, Bombay Samachar Marg, Mumbai and other offices in Mumbai situated at Express Towers, Nariman Point and Makers Towers, Cuffe Parade, Colaba. The petitioner nos. 2 to 7 are the partners of the petitioner No.1 firm and each of them is a Chartered Accountant recognised by the Institute of Chartered Accountants of India.

4. The Criminal proceeding was instituted against the petitioners by 2nd respondent in the Court of the Metropolitan Magistrate, Esplanade bearing No. 53/SEM/95 for alleged contravension of the Bombay Shops and Establishments Act, 1948 to the following effect:

(i) Failing to register under the Act as a 'commercial establishment',

(ii) not maintaining a register of employment in the prescribed form, and

(iii) Not maintaining the visit book for inspector to record his remarks.

. This criminal case is filed as against

the petitioners in the following circumstances:

. Petitioner firm was registered under the Bombay Shops & Establishments Act, 1948 upto the year 1966. In a decision of this Court in the case of N.E.Merchants v/s. Bombay Municipal Corporation reported in 1967 Mh.L.J. 1008, it was held that the office of the 'Chartered Accountant' was not a commercial establishment. Therefore, the Municipal Corporation of Greater Mumbai by letter dated 9th November 1967 informed the petitioner firm that the firm needs no longer to register itself under the said Act. The said letter is produced on record. However, in the year 1977 the Bombay Shops & Establishments Act, 1948 was amended by Amendment Act of 1977, being Maharashtra Act No. 64 of 1977. The definition of the "commercial establishment" was amended to include the establishments of Chartered accountants, tax consultants along with other professions. However, for the first time on 17th October 1994, the respondent No.2 Shri. R. G. Prabhu, Senior Inspector, A-Ward, Municipal Corporation, Greater Mumbai visited the petitioner's firm - office at Allahabad Bank Building and inspected the record and books of the firm. Following the

said visit, the petitioner firm addressed a letter dated 9th November 1994 to the Municipal Corporation, Greater Mumbai explaining that the petitioner firm was/is not a commercial establishment as contemplated under the said Act and the provisions of the said Act ought not to be made applicable to the petitioner firm. However, the petitioner firm has not received any reply to the said letter dated 9.11.1994. But on 27.6.1995 the petitiner nos. 2 to 7 received summons from the Court of the Metropolitan Magistrate, Esplanade requiring the petitioners to appear before the Court on 3.7.1995. The summons was in respect of case No. 53/SEM/1995 registered on a complaint filed by the Senior Inspector, A-Ward, Municipal Corporation, Greater Mumbai under section 52/56 of the Bombay Shops & Establishments Act, 1948 for the contravention of the provisions of sections 7(1) & (4) of the said Act and rules 20(1), 20(3)(a)(5) of the Maharashtra Shops & Establishments Rules, 1961. Thus, being aggrieved by the inclusion of the profession of Accountants by Amending Act of 1977 within the definition of the commercial establishment and being further aggrieved by the summons that has been issued by the Special Metropolitan Magistrate, Esplanade Court against the

petitioner nos. 2 to 7 for alleged contravention of the provisions of the Bombay Shops & Establishments Act, 1948, the petitioners have approached to this Court seeking declaration that the said provision of the amending Act of 1977 is unconstitutional.

5. The rule was issued by this Court on 20.11.1995 and the interim relief was granted. Since the constitutional validity of the amending Act of 1977 is challenged, on 21.3.2005 notice was issued by this Court to the office of Advocate General. Thus, even though the State of Maharashtra was a party since beginning and further a special notice was issued by this Court to the Advocate General as stated above, no reply-affidavit has been filed by the respondent - State opposing the petition. It is further to be noted that the respondent no.2, the Inspector under the Bombay Shops & Establishments Act, 1948 of the Municipal Corporation, though was represented by a counsel for the corporation has also not filed any return. Thus, so far as the factual averments in the petition are concerned, the petition proceeded without any opposition and/or denial from the side of the respondents. This is more specifically placed on record in order to state that the

respondents have not placed on record the nature of the activities, as according to them which are/were carried on by the petitioners in the premises at Allahabad Bank Building where the Senior Inspector of the Municipal Corporation had visited so as to demonstrate that in fact the activities carried on by the petitioners are/were commercial activities. Thus, there was an opportunity to file a return explaining factually the activities which the petitioner were carring on in the said premises so as to show that the activities of petitioners are commercial activities. But the said opportunity was not availed by the respondents.

6. The petitioners have stated that the petitioner No.1 firm is a firm of Chartered Accountants and each of the partners of the said firm is a Chartered Accountant and the petitioners are not engaged in any business and/or trade and/or any activity which is commercial in nature and derogatory to the provisions of the Chartered Accountants Act, 1949.

7. According to the learned counsel for the petitioner the amendment of the definition of "commercial establishment" as contained in section

2(4) of the Bombay Shops and Establishments Act, 1948 (No. 64 of 1977) enlarging the meaning of the word commercial establishment so as to include the establishments of Chartered Accountants and/or a firm of the Chartered Accountants is not justified since the Chartered Accountants and/or the firm of Chartered Accountants are regulated by the Chartered Accountants Act, 1949. It is submitted that the 1st petitioner- firm and the petitioner nos. 2 to 7 being engaged purely in professional activities is not a commercial venture and consequently cannot be considered as a commercial establishment to which the provisions of the Act of 1948 are applicable. It is urged that the class of Chartered Accountants and the firm of the Chartered Accountants did not par-take all the attributes of the business, commerce or trade which were necessary for bringing them within the definition of commercial establishment and in view of the avowed object of the Act, as originally framed, the inclusion of the Chartered Accountants in the definition was arbitrary, irrational, and was therefore voilative of Article 14 of the Constitution of India. In order to demonstrate that the petitioner is not carrying out a commercial activity and/or activities which can be termed as commercial activities,

learned counsel has taken us through the petition demonstrating the work which has been carried out by the petitioners in their firm. The petitioners have also relied upon:

1967 Mh.L.J. 1008 in the matter of N.E.Merchant v/s. The Bombay Municipal Corporation

AIR-1969 SC 63 Dr. Devendra N. Surti v/s. The State of Gujarat.

1984 LIC 1587 (SC) V. Sasidharan v/s. M/s. Peter & Karunakar & others

1991 Lab.I.C. 427 (Karnataka High Court) Phillipose & Co., & Ors. v/s. the State.

1991 Lab.I.C. 1408 (Kerala High Court) P. K. Ramanathan v/s. The state of Kerala

The unrepoted judgment of the Calcutta High Court in Suit No. 4615 of 1989 dated 29th June 1990 in the matter of

Arovinda Roychowdhary & Others v/s. The chief Inspector, Shops & Establishments & others.

2001 (1) L.L.N. 121 (A.P. High Court)

in the matter of K. **Gopalakrishnan v/s. Assistant Inspector of Labour (Assistant Labour Officer), Rayadurg**

8. In order to demonstrate that the profession involves the idea of occupation requiring purely intellectual skill and/or manual skill controlled by intellectual skill of the operator as distinguished from an occupation which is substantially the production or sale or arrangement for the production or sale of the commodities; the learned counsel relied upon various pronoucements of different High Courts, as stated above. These cases have considered the professions like - legal profession, solicitors and Chartered Accountants. The learned counsel submitted that the profession of the Chartered Accountant is not a commercial venture so as to include it into the definition of the commercial establishment as has been done by the amending Act of 1977 (64 of 1977). The learned counsel very emphathetically relied upon the case of

1986 Lab.I.C. 318 Narendra Keshichand Fuladi & Anr. v/s. The State of Maharashtra wherein the Division Bench of this Court has considered the validity of the amendment to section 2(4) of the Bombay Shops & Establishments Act, 1948 as amended by Amending Act 64 of 1977 in respect of the "legal practitioners" and has declared that the said definition to the extent of inclusion of profession of the legal practitioner is uncontitutional and struck down the same, as it herds together commercial establishment with the profession of the legal practitioner and hearding together legal profession with other professions and/or business, trade activities is irrational and arbitrary. The learned counsel further submitted that the profession of legal practitioner and that of Chartered Accountants in sofar as service, discipline and control is concerned is one and the same. He submitted that profession of Chartered Accountant is also wrongly, arbitrarily and irrationally herded together with business, trade, hotel, restaurant, etc., by the said amending Act and, therefore, it is necessary to declare said amending Act to be unconstitutional as was done in case of Narendra Fuladi referred to above, and therefore, have challenged the said amending Act.

9. Learned Additional Advocate General appearing for the State submitted that the ratio of the judgment reported in **1967 Mh.L.J. 1008 in the matter of N.E.Merchant v/s. The Bombay Municipal Corporation** cannot be read so as to mean that provisions of the Bombay Shops and Establishments Act, 1948 did not apply to any establishment of a Chartered Accountants in general.

10. Learned Associate Advocate General, Shri. A. A. Kumbhkoni invited our attention to the guarded words reflected in the said jugdment.

> "We should like to guard ourselves against saying that in no conceivable circumstances could the profession of a chartered accountant be organised on a commercial basis."

. Thus, he submitted that the judgment itself contemplated every possibility that the profession of the Chartered Accountant can be conducted in an organised manner or on commercial basis. Therefore, there is no reason to read this judgment to mean that thereby it is laid down as a blank preposition of law that the said Act of 1948

did not and could not apply to each and every establishment of the Chartered Accountants. He submitted that there was enough evidence which was sufficient to consider that the petitioners in that case not conducting the profession of the Chartered Accountant in a commercial manner. He submitted that on the other hand in the present matter the averments of the petitioner coupled with the civil application filed by the employees of the petitioner for intervention shows that prima facie the petitioner are conducting the commercial activities in the establishment. However, he submitted that after trial alone it will be possible to reach at a definite conclusion in that regard.

11. Relying upon **AIR-1969 SC 63 Dr. Devendra N. Surti v/s. The State of Gujarat**, he submitted that it was possible to have a professional establishment of Doctors, where activities carried on are of commercial character. In that case, again appreciating the nature of the activities carried out at the dispensary of the petitioner from that case it was held that the case of the petitioner therein did not fall within the purview of the concerned Act. He relied upon (2005) 9 SCC 605 to demonstrate that the hosptial conducted was held to

be an establishment within the meaning of the terms as defined in Bihar Shops & Establishmwents Act. The learned Additional Advocate General also relied upon AIR-1963 CAL 310 in the case of Rabindra Nath Sen to show that the profession of Chartered Accountant is distinguishable from that of the solicitors and to show that the Chartered Accountant can carry on his business in a commercial manner even while strictly complying with the provisions of the Chartered Accountants Act, 1949. He invited our attention to the decision of the Supreme Court in the case of Federation of Indian Chambers of Commerce reported in (1975) 3 SCC 64 and submitted that the Supreme Court has noted the similar view and therefore there is every room to conclude that at an establishment of a Chartered Accountant it is possible to conduct activities in an organised commercial manner." Thus, the emphasis of argument was that, that the cases upon which the learned counsel for the petitioner have relied upon have not led to a blanket proposition of law in respect of the professions that the professions can/could not be carried out as commercial establishment, and more specifically in respect of the profession of the Chartered Accountants and submitted that those cases have been decided on the facts of those cases.

12. Learned Additional Advocate General further submitted that the case in respect of the Solicitors and lawyers cannot be compared with another profession, much less that of the doctors, Chartered Accountants and/or engineers. He submitted that AIR-1986 Lab.I.C 318 Narendra K. Fulladi v/s. State of Maharashtra being the case of the legal practitioners cannot be applied to the case of the Chartered Accountants, because there are no common properties or characteristics to be found in the establishment of Chartered Accountants and the establishments of legal practitioner. He submitted that establishment of Chartered Accountant certainly be conducted, even within the provisions of a Chartered Accountants Act, 1949 in an organised and commercial manner and that therefore such an establishment has always been included within the provisions of the said Act of 1948. The Maharashtra Act No. 64 of 1977 to that extent is only clarificatory in nature and emphasises the position that already existed even prior to the said amending Act. The same has to be read to mean that the provisons of the Act will apply to such of these establishments where the activities in issue are conducted in an organised and commercial manner.

Therefore, learned counsel submitted that the question, whether a particular establishment is a commercial establishment will have to be decided on the basis of the activities in issue being conducted in an organised and commercial manner or not, and will depend upon facts of each case and decision thereof will depend upon the evidence that may be led in such case. Without there being any evidence led to show as to the manner in which the activities in issue are conducted at a given establishment, as a general preposition of pure law, it cannot be said that each and every establishment of a Chartered Accountant is not a commercial establishment. It is further submitted that, therefore specific inclusion of such establishments in the definition of the term 'commercial establishment' by the Maharashtra Act No. 64 of 1977 does not amount to herding together these establishments, which was/is impermissible under Article 14 of the Constitution. He submitted that the said Act of 1948 is after all a social piece of legislation meant to protect the interests of the employees of these commercial establishments and therefore is required to be construed accordingly. The provisions of the Maharahstra Act No. 64 of 1977 are also required to be construed in that spirit. He also submitted that there is

presumption as to the constitutional validity of these provisions and it cannot be said that the petitioners have been able to discharge their burden in proving it to the contrary. He further submitted taking us through the various chapters of the Bombay Shops & Establishments Act, 1948 that Part-I consists of shops; Part-II consists of commercial establishments; Part-III consists of residential hotels; Part-IV consists of restaurants and eating houses; and Part-V consists of theaters and other places of public amusement or entertainment. Thus, he submitted that the scheme of the Act demonstrates that the said Act does not treat all the commercial establishments such as that of a Chartered Accountant and other establishments in an identical manner by herding them together. On the contrary, each type of establishment is treated separately. He invited our attention to some of the provisions of Schedule-II to the said Act of 1948, in particular, serial No. 18 and 22 of this Schedule which show that the establishments of Income Tax practitioners are exempted from operations of some of the provisions of the said Act of 1948. According to him the scheme of the said Act of 1948 shows that instead of having separate statutes for each type of such establishment, all these

establishments of various types and kinds are covered by only one statute, viz., the said Act of 1948, albeit treating them at some places similarly wherever found requisite and separately wherever necessary. It is submitted that on this ground it can not be said that there is herding of establishments in such a manner that the same is hit by Article 14 of the Constitution. It is constitutionally permissible to have such a classification, as held by the Supreme Court in 1985 (supp) SCC and (2004) II SCC 526 and thereby submitted that the legislation cannot be faulted and held unconstitutional for not having sub-classification or so to say micro - classification. Then learned Additonal Advocate General relied upon 1995 Mah.L.J. 420 and (2001) 1 SCC 57 and submitted that the activities of consultancy at the establishment have been held to attract the provisions of the said Act of 1948. Therefore, he stated that the said activities of petitioners are covered under the definition of the commercial establishment.

13. The Bombay Shops & Establishments Act, 1948 (Bombay Act No. LXXIX of 1948) has been passd to consolidate and amend the law relating to

conditions of work and employment in shops, commercial establishments, residential hotels, restaurants, eating houses, theaters, other places of public amusement or entertainment and other establishments. The interpretation clause Section 2 (8) defines "establishment" in the following words:

> "Establishment" means a shop, commercial establishment, residential hotel, restaurant, eating house, theatre, or other place of public amusement or entertainment to which this Act applies and includes such other establishment as the State Government may, by notification in the Official Gazette, declare to be an establishment for the purposes of this Act."

14. The words "shop", "Commercial establishment", "residential hotel", "restaurant" "eating house", "theatre", etc., have been separately defined in various sub-sections of section 2 of the Act. However, in the present matter we are concerned with the definition of a "commercial establishment", Since it is the stance

of the petitioners that the petitioner is not carrying on any commercial activity and/or commercial venture and the respondents are contending that the petitioners are carrying on commercial activity in an organised manner.

15. Section 2 sub-section (4) has originally (i.e., before amendment) given the definition of "commercial establishment" which reads as under:

> "Commercial establishment" means an establishment which carries on, any business, trade or profession or any work in connection with, or incidental or ancillary to, any business, trade or profession and includes a society registered under the Societies Registration Act, 1860 (XXI of 1860), and a charitable or other trust, whether registered or not, which carries on whether for purposes of gain or not any business, trade or profession or work in connection with or incidental or ancillary thereto but does not include a factory, shop, residential hotel, restaurant, eating house, theatre or

other place of public amusement or entertainment."

16. By the amending Act 64 of 1977 an inclusive clause was added in the said definition and the amended definition reads as under:

> "Commercial establishment" means an establishment which carries on, any business, trade or profession or any work in connection with, or incidental or ancillary to, any business, trade or profession and includes establishment of **any legal practitioner, medical practitioner, architect, engineer, accountant, tax consultant or any other technical or professional consultant** and also includes a society registered under the Societies Registration Act, 1860 (XXI of 1860), and a charitable or other trust, whether registered or not, which carries on whether for purposes of gain or not any business, trade or profession or work in connection with or incidental or ancillary thereto but does not include a factory, shop, residential hotel, restaurant, eating house, theatre or other place of public amusement or entertainment." (Portion underlined is the portion added by the amending act No. 64 of 1977, the validity of which is the subject matter of consideration of this petition.)

17. It is to be noted that the validity of this clause to the extent of inclusion of "legal practitioner" in the said definition has been considered by the Division Bench of this Court in

the matter of **Narendra Keshichand Fuladi & Anr. v/s. The State of Maharashtra [1986 Lab.I.C. 318]**. The said amendment to the extent of the "legal practitioners" has been struck down by the Division Bench of this Court by the said judgment. We will consider this judgment at appropriate stage. But at this stage at inception it is placed on record that so far as the legal practitioners are concerned the said judgment is still in field.

18. The said clause has been amended by the State Legislature for the object and the reasons as reflected from the Maharashtra Government Gazette dated July 28, 1977. The statement of objects and reasons for an amendment of the word "commercial establishment" is as follows:

> "**sub-clause (b) -** This sub-clause amends definition of **"commercial establishment"** for including establishments of legal, medical and other practitioners within the expression commercial establishment, so that the Act applies to them. Some Courts have held that establishments of lawyers, medical practitioners, chartered accountants, etc., are not "commercial establishments" as defined at present with the result that the employees employed therein are denied coverage benefits and protection of this Act." (emphasis supplied by us.)

19. Thus, the statement of objects and

reasons itself shows that earlier to the amendment, unamended definition of "commercial establishment" was considered by the Courts and it was decided that the establishments of the lawyers, medical practitioners, Chartered Accountants, etc., are not commercial establishments and the Act is not applicable to them. No doubt, as has been held by the Supreme Court in AIR-1972 SC 168 the word **"includes"** is often used in the interpretation clause in order to enlarge the meaning of the words or phrases appearing in the body of the statue. When it is so used, these words and phrases must be construed as comprehending not only such things as they signify according to their nature and import but also those things which the interpretation clause declares that they shall include. While considering this ratio of the Supreme Court in the light of the inclusion of the "legal profession" in the said definition the Division Bench of this Court has observed in the matter of **Narendra Keshichand Fuladi & Anr. v/s. The State of Maharashtra [1986 Lab.I.C. 318]** that:

> "We are satisfied that there can be no challenge merely on the ground of enlargement of the meaning of the word "commercial establishment", once the competency of the State Legislature is conceded. However, in none of the cases

> on which reliance was placed on behalf of the respondents, did the question of violation of Article 14 of the Constitution come up for consideration, as has been argued before us."

. Thus, the Division Bench of this Court accepting the right of the Legislature to amend and enlarge the definition by inclusion clause has proceeded to consider the question of vires of the said provision on the touchstone of Article 14 of the Constitution. While considering this matter, we too have to bear this in mind.

20. We shall also keep in mind that in West Bengal Shops & Establishments Act, 1963, the amendment was carried in the year 1981 and by inclusive clause the legal practitioners were included in the definition of commercial establishment. Validity of said amendment was considered by Calcutta High Court in the matter of **Dipti Kumar Bose v/s. Chief Inspector (Shops & Establishments) reported in 1986 Lab.I.C. 1718 Calcutta, (= 1986(1) CNN 50)** where Calcutta High Court has struck down said amendment having found ultra-vires of Article 19(1)(g) of the Constitution of India.

21. This Court while interpreting definition

of commercial establishment has explained in **Sakharam Narayan Kherdekar v/s. City of Nagpur Corporation (AIR-1964 Bom 200)** that in giving meaning to the definition of the phrase "commercial establishment" in sub-section (4) of section 2 emphasis is obviously laid on the character of an establishment as a "commercial establishment". Unless an establishment, even though carrying on a business, trade or profession, is of a commercial character or the activities are of the commercial nature, it cannot be said that it is within the meaning of the Act.

. After having considered the dictionary meaning of the words "commerce" and "commercial" the Division Bench has stated:

> "Thus, the very concept of activity which can justly be called a commercial activity, must imply some investment of capital and the activity, must run the risk of profit or loss. Understood in this sense, therefore, we are inclined to hold that it is not every establishment in the sense of premises or buildings where business, trade or profession is carried on that is intended to be governed by the Act, but only those premises though carrying on **one or other** of these kinds of activities which are of a commercial nature."

. Thereafter having scrutinised the English cases Court has observed:

> "Thus it is clear that an activity to be a profession must be one carried on by an individual by his personal skill, intelligence and dependent on individual characteristics, as observed by their Lordships of the Supreme Court in AIR-1962 SC 1080 which was a case regarding work of solicitors and also attorneys. It is the personal skill, intelligence, study, integrity which is a core of a professional activity. If that is the test by which one has to determine whether an activity is a profession as distinguished from trade, or business, then it will be difficult to hold that the profession of law carried on by an Advocate or a legal practitioner in any manner or to any extent partakes of a commercial character or is a commercial activity. As we have held, unless the trade, business or profession carried on also partakes of a commercial nature or venture, the premises in which such activities are carried on will not attract the provisions of the Shops Act."

21. Even after amendment of 1977 when this Court considered the amended provisions in the matter of **Narendra Keshichand Fuladi & Anr. v/s. The State of Maharashtra [1986 Lab.I.C. 318]**, this Court has observed by making reference to Sakaharam Narayan Kherdekar's case (supra) that:

> "an activity to be a profession must be one carried on by an individual by his personal skill, intelligence and dependent on individual characteristics, and it is the personal skill, intelligence, study, integrity which is the core of a professional activity. The very concept of activity which can justly be called a commercial activity, must imply some investment of capital and the

> activity must run the risk of profit or loss. It is not every establishment in the sense of premises or buildings where business, trade or profession is carried on that is intended to be governed by the Act."

. The Division Bench of this Court pointed out that the nature of law practice, contrasted with other commercial ventures, is distinguished by four features, according to Henry S. Drinker in his book "Legal Ethics" page 5. The primary characteristics which distinguish the legal profession from business are :

> (1) a duty of public service in which one may attain the highest eminence without making much money,
>
> (2) a relation as an "officer of Court" to administration of justice involving thorough sincerity, integrity, and reliability,
>
> (3) a relation to clients in the highest decree fiduciary, and
>
> (4) a relation to colleagues at the bar characterised by candor, fairness and unwillingness to resort to current business methods of advertising and encroachment on their practice, or dealing directly with their clients.

. Thus, Division Bench demonstrated thereafter that the discussion in Bangalore Water Supply case (AIR-1978 SC 548) does not touch any way

of these aspects as it was not necessary there to decide these other questions in view of the point fell for decision there, namely, definition of "industry".

. The Division Bench observed :

> "the concept of commercial establishment is very much different from the concept of industry and whatever may have been said in respect of 'industry' cannot be imported while considering the width, nature and the extent for the concept of 'commercial establishment'."

22. Thus, after the amendment of Act in 1977, it was tried to be demonstrated that the judgment of Sakharam's case is not good law to interpret amended provision since in Bangalore Water Supply Case, the solicitors' case upon which Sakharam's case was based is overruled. However, dealing with this aspect Division Bench explained that the judgment in Banglore Water Supply case will not be of any consequence when this Court is considering as to what is the "commercial establishment" since the said judgment of the Banglore Water Supply Case is in respect of meaning of the word "industry". Thus, Division Bench independent of the Solicitor's case, considered the case of the legal practitioners and

concluded that Office of lawyer or a Firm of lawyers is not commercial establishment following Solicitor's case referred to above. Apart from these two cases pertaining to the legal practitioners, the Supreme Court in **1984 LabIC 1587 (SC) V. Sasidharan v/s. M/s. Peter & Karunakar & others** has considered the case of legal practitioner in the light of the provisions of the Kerala Shops and Establishments Act and the definition of the commercial establishment in the said Act. The Supreme Court observed while considering the definition of "establishment" which means a shop and commercial establishment that:

> "it does not require any strong argument to justify the conclusion that the office of a lawyer or a firm of lawyers is not a 'shop' within the meaning of section 2(15). Whatever may be the popular conception or misconception regarding the role of today's lawyers and the alleged narrowing of the gap between a profession on one hand and a trade or business on the other, it is trite that traditionally, lawyers do not carry on a trade or business nor do they render services to customers."

. Considering the commercial establishment, the Supreme Court observed that:

> "The proposition is well established that words which occur in the same context must take their colour from each other. It is unrealistic to dissect the

> definition clause in Section 2(4) and to catch a word here or there in order to bring a lawyer's office within the four corners of the definition of 'commercial establishment'. The various clauses of that definition would show that establishment far apart from professional offices were within the contemplation of the legislature."

. Thus, Court concluded that "for the reasons we are of the opinion that the office of the lawyer or of a firm of lawyers is not a 'commercial establishment' within the meaning of the Act."

. Thereafter scrutinising var provisions of the said Act, the Apex Court observed that:

> "These and other cognate provisions of the Act show that a lawyer's office cannot possibly be comprehended within the meaning of the expression 'commercial establishment' as defined in Section 2(4) of the Act."

23. The above cases are in respect of the legal profession. This Court has also considered the provisions of the Bombay Act prior to amendment, in **1967 Mh.L.J. 1008 in the matter of N.E.Merchant v/s. The Bombay Municipal Corporation** in connection with the Chartered Accountants. While considering whether the firm of Chartered Accountants is a commercial establishment the reference was made to

the reported case of **Sakharam Narayan Kherdekar v/s. City of Nagpur Corporation (AIR-1964 Bom 200)**. The argument in the case of Sakharam's case was again advanced in the case of Chartered Accountants in the matter of N. C. Merchant. However, the petitioners submitted that they are practicing profession and are in the practice of Chartered Accountants profession and there is no element of commerce and their establishment is not a commercial establishment. While considering the word "profession" the reference was made to Commissioners of Inland Revenue v/s Maxe where it was observed that :

> "....it seems to me as at present advised that a 'profession' in the present use of language involves the idea of an occupation requiring either purely intellectual skill, or of manual skill controlled, as in painting and sculpture, or surgery, by the intellectual skill of the operator, as distinguished from an occupation which is substantially the production or sale or arrangements for the production or sale of commodities. The line of demarcation may vary from time to time. The word 'profession" used to be confined to the three learned professions, the Church, Medicine and Law. It has now, I think, a wider meaning."

. The Bench further observed that :

> "The three learned professions referred to in the above quotation cannot be the

only professions for all time. Times change. The sphere of human activity and endeavour is constantly expanding, giving rise to problems which require specialisation and expertise. In the course of last two centuries, trade, commerce and industry have vastly developed bringing in their wake problems which have to be tackled by experts. The old crystalised learned professions of the Church, Medicine and Law were by the very nature of their training unable to solve the problems of the new developments in trade, commerce and industry, which, inter-alia, threw up a team of experts in the shape of chartered accountants having specialised knowledge. It was found necessary by the State to regulate this profession of chartered accountants, and that gave birth to the Chartered Accountants Act, 1949. The very preamble of this Act recognises that the Chartered Accountants are practicing a profession and for the regulation of that profession it was necessary to establish an Institute of Chartered Accountants. In other words, it has now been statutorily recognised that the activities of a chartered accountant are not a mere business or trade, but a profession and this is clear from the various provisions that have been made in that Act to lay down the standard of qualifications for a chartered accountant and standards of conduct when practicing as a Chartered Accountant. Section 19 of the Chartered Accountants Act, 1949, provides that a register of the members of the Institute, viz., the Institute of Chartered Accountants, shall be maintained showing therein certain particulars about every member of the Institute. Every member who is entered in this register is a chartered accountant. Section 3 shows that the Institute incorporated, to begin with, all those persons whose names had been entered in the register at the commencement of the Act, and provision was made that all persons whose names were entered in the Register after the commencement of the Act would also become

members of the Institute which was constituted a body corporate. Section 4 provides that persons would be entitled to have their names entered in that Register. Clause (iii) of sub-section(1) of Section 4 shows that any person who has passed the examination for the Government Diploma in Accountancy or an examination recognised as equivalent thereto by the rules for the award of the Government Diploma in Accountancy before the commencement of this Act, was entitled to be entered in the register. The members of the Institute are divided into two classes designed as associates and fellows depending upon the number of years one has been in practice as a chartered accountant. Section 6 provides that no member of the Institute shall be entitled to practice unless he has obtained from the Council a certificate of practice.

9. The expression "to be in practice" has been defined in sub-section (2) of section 2 of the Act. A member of the Institute shall be deemed "to be in practice" when individually or in partnership received or to be received, (i) engages himself in the practice of accountancy; or (ii) offers to perform or performs services involving the auditing or verification of financial transactions, books, accountants or records or the preparation, verification or certification of financial accounting and related statements or holds himself out to the public as an accountant; or (iii) renders professional services or assistance in or about matters of principle or detail relating to accounting procedure or the recording, presentation or certification of financial facts or data; or (iv) renders such other services as, in the opinion of the Council, are or may be rendered by a chartered accountant in practice, and every such member of the Institute in practice is known as a chartered accountant under section 7. Section 8 deals with the disabilities which disqualify a person from being entered or

borne on the register. He cannot be entered or borne on the register if he has not attained the age of twenty one years, or is of unsound mind, or is an undischarged insolvent, or has been convicted by a competent Court of an offence involving moral turpitude and punishable with transportation or imprisonment or of an offence, not of a technical nature, committed by him in his professional capacity unless in respect of the offence committed he has either been granted a pardon or, on an application made by him in that behalf, the Central Government has, by an order in writing, removed the disability. Similarly, one more disability is that a member who has been removed from membership of the Institute on being found on inquiry to have been guilty of professional or other misconduct shall not be a member until after the expiry of the period for which he has been removed.

10. The affairs of the Institute are managed by a Council constituted under Section 9 of the Act. It consists of not more than 24 members elected by members of the Institute and six persons nominated by the Central Government. It has a President and a Vice-President and the duration of any Council constituted under the Act is for three years. The functions of the Council as laid down under section 15 are important from our point of view. The duty of carrying out the provisions of the Act is vested in the Council, and these duties include, (a) the examination of candidates for enrolment and the prescribing of fees therefor; (b) the regulation of the engagement and training of articled and audit clerks; (c) the prescribing of qualifications for entry in the Register; (e) the granting or refusal of certificates of practice under this Act; (f) the maintenance and publication of a Register of persons qualified to practise as chartered accountants; (h) the removal of names from the Register and the restoration to the Register of names which have been removed; (i) the

regulation and maintenance of the status and standard of professional qualifications of members of the Institute; and (l) the exercise of disciplinary powers conferred by this Act. Chapter V deals with misconduct. Elaborate provisions have been made to subject the members of the profession to a rigorous discipline. The two Schedules to the Act enumerate the various items of professional misconduct in relation to chartered accountants in practice. Section 21 provides for inquiry being made into the misconduct of a chartered accountant on complaint. The complaint has to be referred to a Disciplinary Committee formed under section 17 of the Act, and a suitable inquiry has got to be made. In particular instances the case of the delinquent is required to be forwarded to the High Court and the High Court under sub-section (6) of Section 21 may inter alia remove the chartered accountant from the membership of the Institute either permanently or for such period as the High Court thinks fit. Section 22A also provides for an appeal to the High Court. Under Section 24, any person who, not being a member of the Institute, represents that he is a member of the Institute, or uses the designation Chartered Accountant, commits an offence which is punishable with imprisonment or fine. It is similarly an offence under section 24A if any person uses unauthorizedly the name of the Council or awards degree of chartered accountant, etc. Section 30 gives the Council power to make regulations in respect of various matters, and such regulations have been made by the Council and are known as "the Chartered Accountants Regulations, 1964."

11. Stringent provision is made as to what would amount to professional misconduct, and there is not the least doubt that the object is to maintain high standards of profession and integrity. One has only to go through the two Schedules to the Act to see how jealously the statute wants that the integrity of the profession should be maintained. A

Chartered Accountant can not solicit clients or professional work either directly or indirectly by circular, advertisement, personal communication or interview or by any other means. He can not accept a position as Auditor previously held by another Chartered Accountant nor can he engage in any business or occupation other than the profession of Chartered Accountant unless permitted by the Council so to engage. The stringent restrictions that have been placed on him are only a measure of the integrity that should be displayed by the Chartered Accountant in the practice of his profession. And all these matters help to consider whether the activity of the Chartered Accountant is a profession or not. In Currie Vs. Inland Revenue Commissioners, Scrutton, L.J. dealing with a case of an Income Tax Practitioner, observed:

> "I myself am disposed to attach some importance in findings as to whether a profession is exercised or not to the fact that the particular man is a member of an organised profession body with a recognised standard or ability enforced before he can enter it and a recognised standard of conduct enforced while he is practicing it".

Indeed, that would not be a conclusive test, but that is an important element to be considered when the question is whether a particular activity is a professional activity. We further think that in considering whether an activity is a profession or not, we may perhaps be guided by the fact that the Church, the medicine and the Law have been for centuries regarded as Learned Professions. In each of these three, the individual activity is characterised by personal skill and intelligence and is dependent on personal study, character and integrity. These qualities displayed

by the practitioners of these learned professions inspire confidence in persons approaching them for advice or guidance. The first is approached for spiritual comfort and guidance, the doctor for physical or mental ailment and the lawyer for legal advice. But in each case the person who approaches them choses them according to his own conception of the skill, intelligence and integrity of the person approached, and since he approaches in entire confidence, the priest, the doctor and the lawyer have a corresponding obligation not to betray the confidence and advice his client as best as he can. The same element of trust and confidence must be a test in more or less degree in modern professions. A Chartered Accountant is approached by his client for advice and guidance in his problems with regard to trade, business or industry, and it is expected that the Chartered Accountant to the best of his ability, would be in a position to help him in his difficulty and not betray the confidence that is placed in him. This, in our opinion, is one of the elements which should be sought when considering whether a particular person is practicing a profession or is merely doing a business.

12. A rapid survey of the general functions performed by a Chartered Accountant in practice will go to show that the functions are of a highly individualistic character requiring the personal skill, intelligence and integrity on the part of a Chartered Accountant. The Company Law requires that the accounts of a company should be audited by the auditors. Section 226 of the Companies Act, 1956, lays down the qualification and disqualification of auditors. Under that Section, an auditor will not be qualified unless he is a chartered accountant within the meaning of the Chartered Accountants Act, 1949. Section 227 then prescribes the powers and the duties of the auditors. Every auditor of a company has a right of access at all times to the books of

accounts and vouchers of the company and is entitled to require from the officers of the company such information and explanation as the auditor may think necessary for the performance of his duties as an auditor. In carrying out these duties, he can not be cowed down either by the Managing Director of the company or the managing agents because his duties require that he shall faithfully carry out his duties as an auditor without fear or favour and audit the accounts of the company in such a manner that the shareholder get a correct picture of the financial position of the company. Punishment is also provided under Section 233 of the Indian Company Law if the auditors report is made otherwise than in conformity with the requirements of Section 227 and 229 of the Act. In other affairs also relating to companies a Chartered Accountant plays a very vital role. Being trained to maintain costing records he can ascertain the cost of production and of processes at different level of operations in the manufacture of a product. He can by his expert knowledge help a manufacturing company. His services are also frequently sought in connection with the formation and the financial structure in liquidation of limited companies. He is also called upon to carry out investigation to ascertain the financial position of a business in connection with matters such as new issues of share capital, the purchase or sale of a business, reconstructions and amalgamations. He is also fitted to undertake valuation of shares of public and private companies when amalgamations or reorganizations take place. In other words, the Chartered Accountant plays a very valuable role in relation to the financial aspects of the business of a company. He is also well equipped for advising the preparations of tax returns. Drastic forms of taxation are being introduced.

13. The chartered accountant has to keep himself abreast of the current and

continuing tax information. Section 288 of the Income-tax Act, 1961, shows that a chartered accountant is entitled to appear before the Income-tax authorities as the authorized representative of the assesses. That is also the position under the Bombay Sales Tax Act, 1959. (See Section 71). Under the Co-operative Societies Act also he is entitled to be appointed an auditor of Co-operative Societies and Banks. All these multifarious functions call for the exercise of integrity, intelligence and personal skill by the chartered accountant in the service of his client, and therefore, when the Chartered Accountants Act, 1949, describes in its preamble that the avocation of a chartered accountant is a profession, it is not merely a figure of speech....."

14. The next question for our consideration is whether this profession of the applicants has any commercial element therein, because only then it can be held that the establishment of the applicants is a commercial establishment. We should like to guard ourselves against saying that in no conceivable circumstances could the profession of a chartered accountant be organized on a commercial basis, that is to say, as a commercial venture wherein capital is laid out and a risk run of profit or loss, as suggested by Lord Campbell in the course of arguments in McKay V. Rutherford (1). We are primarily concerned with the applicants, and we have to see whether there is any element of commerce in the profession which they are practising."

. Thereafter the Division Bench referred to the case of **Rabindra Nath Sen v/s. First Industrial Tribunal (AIR-1963 CAL 310) and T.K. Menon and Co., v/s. District Labour Officer, Kozhikode (AIR-1967**

Ker. 31) and observed that even though these cases are pertaining to Chartered Accountants, they are of no use to decide the case in hand. Since those are decisions wherein the definition of industry was under consideration. Since the Division Bench was to consider whether the petitioners in that case were running a commercial establishment as defined under the Bombay Act, the Division Bench found that there is no evidence that any capital has been invested or that the applicants are running an establishment as a commercial concern. Therefore, it is observed that *"because the applicants receive some little co-operation from the articled clerks in checking receipts and payments, an element of commerce is introduced in the professional practice by the applicants ?*

. Division Bench further made the reference to the Solicitor's case reported in **AIR-1962 SC 1080, in the matter of N.U. of C. Employees v/s. Industrial Tribunal** and ultimately decided that the petitioners in that petition were not carrying on the commercial venture.

24. The support is taken by the learned counsel for the petitioners to state that this case

lays down that the profession of Chartered Accountant is not a commercial activity. As against this, learned Associate Advocate General relied upon the observations whereby the Court has made guarded observation that:

> *"in no conceivable circumstances could the profession of a chartered accountant be organised on a commercial basis, that is to say, as a commercial venture wherein capital is laid out and a risk run of profit or loss."*

. Therefore, the learned Associate Advocate General submitted that this case has been decided on the facts of the case and cannot be taken as a ratio decidendi. No doubt that the Division Bench has proceeded in a guarded way and tried to concentrate itself on the facts of the case. However, it will be reflected from the above paragraphs of the said judgment that the Division Bench was very much concerned with the analysis as to what is a profession. What are the learned professions and the requirements of the time to have more learned professions since the time has come when three

learned professions, namely, the Church, Medicine and Law, are by their very nature of training unable to solve the problems of the new developments in trade, commerce and industry, which, inter alia, threw up a team of experts in the shape of Chartered Accountants having specialised knowledge. Division Bench thereafter proceeded to scrutinise the provisions of law applicable to Chartered Accountants, and has analysed that larger question to hold that Chartered Accountants avocation is profession and not business and commercial establishment. It also thereafter has found that in the facts of case also there is no element of business and commercial establishment. Therefore, the submission of learned Associate Advocate General that said case has not laid down ratio that Chartered Accountants profession is not commercial establishment is not correct and same is hereby rejected.

25. However, it requires to be mentioned at this stage that ratios in the matter of **T.K. Menon and Co., v/s. District Labour Officer, Kozhikode** [**AIR-1967 Ker. 31]** and **Rabindra Nath Sen v/s. First Industrial Tribunal (AIR-1963 CAL 310)** were not accepted by the Division Bench of this

court in the above referred judgment since those were the cases deciding the question of "industry" and not relating to the "commercial establishment". Therefore, the reliance placed by the learned Associate Advocate General on these cases before us is of no consequence while deciding the question in hand.

26. The same question has arisen before the learned Single Judge of the Karnataka High Court in the matter of **Phillipos & Co., and others v/s. The State reported in 1990 LAB.I.C. 427**. In the said matter also Phillipos and Company was a registered partnership firm of Chartered Accountants having their office at Bangalore which was registered under the Chartered Accountants Act, 1949. The Senior Labour Inspector on inspection of the premises of the said petitioner noticed several contraventions of the provisions of the Karnataka Shops and Commercial Establishments Act, 1961 and of the Karnataka Shops and Commercial Establishment Rules, 1963 and therefore a notice was issued. Amongst several other contentions raised, one of the contention was that the office of the Chartered Accountant is analogous to the office of the lawyers and that the office of the Chartered Accountants

could not come within the expression either of "shop" or of "commercial establishment" as defined under Sections 2(e) and 2(u) of the Karnataka Shops and Commercial Establishment Act, 1961. Learned Single Judge also scrutinised the provisions of Chartered Accountants Act 1949. Learned Single Judge also traced the position of the Chartered Accountants and Accountants prior to 1949, namely, that the profession was regulated by the Auditors Certificates Rules framed in the year 1932 in exercise of the powers conferred on the Government of India by Section 144 of the Indian Companies Act of 1913. As per the said provisions the Indian Accountancy Board was advising the Government in all matters relating to the profession and was assisting it in maintaining the standards of the professional qualifications and conduct required of the members of the profession. The majority of the members of the Indian Accountancy Board used to be elected by Registered Accountants, and members of the profession from all parts of the Country. These arrangements were intended to be only transitional to lead up to a system in which such accountants would be autonomous association of themselves, largely assume the responsibilities involved in the discharge of their public duties by securing

maintenance of the requisite standards of the professional qualifications, discipline and conduct, the control of the Central Government being confined to their few specified matters. Thereafter Act of 1949 was passed.

. The said Bench of Karnataka High Court, thus, considered the history of profession of Chartered Accountants even prior to the Chartered Accountants Act, 1949. Analysis of the said Act and the duties and functions of Chartered Accountants as carried out by the learned Single Judge of Karnataka High Court is analogous and similar to that of the analysis which has been carried out by the Division Bench of Bombay High Court in the matter of **N.E.Merchant v/s. The Bombay Municipal Corporation (1967 Mh.L.J. 1008)** referred to above.

. In paragraph 40, learned Single Judge ultimately came to the conclusion that the definition of the term "shop" in Section 2(u) has to be restricted in its scope. It clearly envisages an activity which is understood as associated with the carrying on the trade or commerce and cannot take any premises where professional services are rendered.

. In paragraph 41, learned Single Judge concluded that the office of Chartered Accountant or of a Firm of Chartered Accountants cannot be construed premises where any trade or business is carried on.

. In paragraph 42 the Judge observed that definition of the term "shop" means "any premises where services are rendered to customers" appears to be not applicable to the case of the Chartered Accountants. The Chartered Accountant carries on a learned profession and that it is his special qualifications, professional equipment and knowledge that are placed at the disposal of his clients. But nature of the work of Chartered Accountants in practice, the character of the work he can do as a Chartered Accountant with the restrictions and obligations to conform to the norms of professional conduct would show that the performance of his functions and duties is analogous to the functions and duties of a Lawyer or Solicitor. The requirements of learning, skill and integrity for the carrying on of the profession would make it clear that the Office of the Chartered Accountant or a Firm of Chartered Accountants cannot be regarded

as premises where services are rendered to the customers. The context as well as the phraseology in which this part of the definition appears associated as it is with the expressions "trade or business" on the one hand and with Offices, Store-rooms, Godowns or Ware house on the other, if the ordinary principles of construction are applied, it appears to me this part of the definition will have to be construed as services rendered to customers in the carrying of trade or business.

. Ultimately, learned Single Judge concluded in paragraph 48, following the case of V. Sasidharan v/s. M/s. Peter and Karunakar (1984 Lab.I.C. 1587) that the Office of a Chartered Accountant or of a Firm of Chartered Accountants is not a "shop" within the meaning of the definition of the term in Section 2(u) of the Act of 1961.

. Learned Single Judge thereafter proceeded to consider whether the Chartered Accountant's Office or a Firm of Chartered Accountants is a "commercial establishment" as defined in section 2(e) of 1961 Act as is reflected in paragraph 49 of the said judgment. Thus, in paragraph 50 it is concluded that it is not a "commercial

establishment". In Paragraph 57 a clear cut finding has been recorded by the learned Single Judge that the Office of Chartered Accountant or a Firm of Chartered Accountants is not a "commercial establishment" within the meaning of the Act of 1961. Therefore, the provisions of the said Act are not applicable and prosecution lodged was ultimately quashed.

27. The same question had also arisen before the learned Single Judge of Kerala High Court in the matter of **P.K.Ramanathan v/s. The State of Kerala & Another reported in 1991 Lab.I.C. 1408.** In the said matter the Government of Kerala issued a notification on 30.7.1981 declaring the "Offices of Registered Accountants and Auditors" in the State of Kerala to be commercial establishments for the purpose of Kerala Shops and Commercial Establishments Act, 1960. The petitioners in that case who were practicing Chartered Accountants challenged the validity of the said notification.

The question was considered by Justice K.T.Thomas (as he was then). In the light of the fact that the Government of Kerala had no case that but for the notification the office of the Chartered Accountants would fall within the purview of

commercial establishments as defined in the Act. Therefore, the question was whether the Government was empowered to declare the office of a Chartered Accountant as "commercial establishment." Learned Single Judge considered the definition of "commercial establishment" as given in the Kerala Act which is similar to that of the Bombay Act. The learned Single Judge also considered the scheme of the Chartered Accountants Act, 1949, their duties as was done by Justice Palekar in the matter of **N.E.Merchant v/s. The Bombay Municipal Corporation (1967 Mh.L.J. 1008)**, the learned Single Judge also referred to **1978 Lab.IC 1614, V. Sasidharan v/s. M/s. Peter & Karunakar & others** which was a judgment in respect of firm of lawyers and which was confirmed by the Supreme Court reported in 1984 Lab.I.C. 1587 (SC) (referred by us supra) and observed:

> "Is there any perceptible difference between office of an advocate and that of a Chartered Accountant ? An endeavour was made to draw some areas of nine distinction. No doubt, legal profession and Chartered Accountant's professions have differences and dissimilarities. But the areas of similarities would outweigh the dissimilarities between the two and hence the legal position applicable to the profession of law can generally be applied to Chartered Accountants also in this regard."

. Thereafter relying upon the judgments of Bombay High Court in the matter of **N.E.Merchant v/s. The Bombay Municipal Corporation (1967 Mh.L.J. 1008)** and of Karnataka High Court in the matter of **Phillipos & Co., and others v/s. The State, reported in 1990 LAB.I.C. 427**, it was observed that the above decisions also support the stand taken that the office of the Chartered Accountants is not a "shop". It follows that his office is not an establishment falling within the purview of the definition in the Act. The conclusion is inevitable that Government cannot, through a notification, bring the office of a Chartered Accountant within the purview of the Act. The notification is, therefore, liable to be struck down.

28. Thus, what is to be noted is that in Bombay Act, by inclusive clause the Chartered Accountants are included in the definition of "commercial establishment" while under the Kerala Act they were included by Government Notification.

29. It will be also evident from an unreported judgment of Calcutta High Court in **Aurovinda Roychoudhury in original writ petition no. 4615 of 1980, dated 29th June 1990,** wherein the

challenge was raised in respect of the inclusion of the "establishment of accountant" in the definition section as appeared under section 2(2) of the Amendment Act of 1981 thereby the Chartered Accountants were included within the definition of the "commercial establishment" of the Shops and Commercial Establishments Act of the State. The learned Single Judge relied upon **Dipti Kumar Basu & Ors. v/s. The Chief Inspector Shops and Establishments & Ors reported in 1986(1) CNN 50** in which it was decided that the inclusion of legal profession within definition of "commercial establishment" by the amending Act of 1981 in said definition as provided under West Bengal Shops & Establishments Act, 1963 is ultra-vires to the provisions of Article 19(1)(g) of the Constitution of India. Relying upon this judgment, the learned Single Judge has then concluded that the inclusion of the establishment of the Chartered Accountants within the definition of "commercial establishment" is violative of the constitutional safeguards and the same was declared ultra-vires.

30. It is equally to be noted that the same question was raised before the Andhra Pradesh High

Court in the matter of **K. Gopalakrishnan & Assistant Inspector of Labour (Assistant Labour Officer), Rayadurg (2001(1)LLN 121)**. The questions raised were whether the office maintained by the Chartered Accountant in practice is/was a "shop" within the meaning of Section 2(21) of the Andhra Pradesh Shops and Establishments Act, 1988, and whether maintenance of the office of Chartered Accountant in practice is a profession just like an Advocate's profession. The learned Single Judge after having considered the provisions of Chartered Accountants Act, 1949 and judgment of the Karnataka High Court in **Phillipos & Co., and others v/s. The State, reported in 1990 LAB.I.C. 427**, has observed thus:

> "7.Therefore, the reading of the above provisions of the Act of 1949 and Regulations, would make it amply clear that a Chartered Accountant in practice has manifold functions and duties to perform and discharge with professional conduct to be observed by him and that apart from possessing required qualification, he requires special skill, learning and experience in the discharge of his duties. The profession is an avocation or occupation requiring special usually advanced education and skill. The work and skill involved in a profession is predominantly mental or intellectual rather than physical or manual.
>
> 8. Therefore, the office of the

> Chartered Accountant or of a Firm of Chartered Accountants cannot be considered as premises where any trade or business is carried out. Therefore, it can be viewed that the office of the Chartered Accountant or of a Firm of Chartered Accountants does not come within the definition of the term in Section 2(21) of the said Act. It is difficult to hold that the office of Chartered Accountant or of a Firm of Chartered Accountants would be a commercial place."

31. Thus, various High Courts as referred to above have considered as to whether the Office of Chartered Accountant or a Firm of Chartered Accountants is a "commercial establishment" or not and have concluded that the Office of Chartered Accountant or a Firm of Chartered Accountant is not a commercial establishment. These High Courts have also treated the profession of Chartered Accountants equal or similar to that of legal profession or Solicitors. High Courts have also considered these issues under the Shops & Establishments Act of the respective State prior to amendment and after the amendment of definition of "commercial establishment" qua the legal profession and chartered accountants.

32. Learned Associate Advocate General Shri. A.A. Kumbhkoni very heavily relied upon **Dr. Devendra N. Surti v/s. The State of Gujarat (AIR**

1969 SC 63). In this case the question involved before the Apex Court was as to whether a Doctor's dispensary is a commercial establishment within the meaning of Bombay Shops & Establishments Act, 1948. The Apex Court ultimately on the facts of the case held that the doctor's dispensary is not a commercial establishment. However, the learned Advocate General relied upon the following portion:

> "It is clear that the presence of profit motive or the investment of capital tradition associated to the notion of trade and commerce cannot be given an undue importance in construing the definition of "Commercial establishment" under section 2(4) of the Act. In our opinion, the correct test of finding whether a professional activity falls within Section 2(4) of the Act is whether the activity is systematically and habitually undertaken for production or distribution of goods or for rendering material services to the community with the help of employees in the manner of a trade or business in such an undertaking. .....
>
> .....It is therefore clear that a professional activity must be an activity carried on by an individual by his personal skill and intelligence. There is a fundamental distinction between a professional activity and an activity of a commercial character and unless the profession carried on by the appellant also partakes of the character of a commercial nature, the appellant cannot fall within the ambit of Section 2(4) of the Act.....

> ..... To put it differently, the manner in which the activity in question is organised or arranged, the condition of the co-operation between the employer and the employees being necessary for its success and its object being to render material service to the community can be regarded as some of the features which render the carrying on of a professional activity to fall within the ambit of Section 2(4) of the Act."

. These portions are very heavily relied upon by the learned Associate Advocate General. He submitted that there are 129 articles clerks at the Bombay office of the Petitioners, 4 managers, 21 persons for routine administration, 2 computer personnel, 16 stenographers and typists and 5 peons, and thereby he submitted that if the strength of the staff is taken into consideration it is an organised activity, systematically carried on. Therefore, the test laid down in the above referred case is satisfied, and therefore the firm of the petitioners shall be held as commercial establishment.

33. Learned Senior Counsel for the petitioners, Mr. J.P. Cama submitted that simply the activity is carried on systematically and habitually by the professionals is not sufficient but the said activity shall result into production or distribution of goods or for rendering material

services to the community or any part of the community with the help of employees in the manner trade or business in such an undertaking is carried on. He submitted that there is a fundamental distinction between a professional activity and an activity of commercial character and unless the profession carried on by the petitioners also partakes of the character of a commercial nature and it cannot be said that there is a commercial establishment. He submitted that the professional does not carry on his profession in any intelligible sense with the active character of his employees and the principle capital which professional brings into his profession is his special or peculiar intellectual and professional equipment and therefor by an application of only one act, namely, that it is an organised and/or systematical activity, it cannot be said that the activity is a commercial activity.

34. No doubt, the strength of staff as stated in the petition is admitted, however in what way the staff is involved in the intellectual activity or the profession is not reflected. On the contrary, it is the case of the petitioners that the petitioners are carrying on the profession or

avocation of the chartered accountants within the four corners of the Chartered Accountants Act, 1949 and that they do not carry on any commercial activity. There is no counter affidavit filed by either of the respondents to demonstrate and/or place on record as to how the staff is involved in an intellectual and skillful activity and which of the partners of the petitioners, being the chartered accountants are disposing of business of firm. Let the facts as it is, there is no material brought on record to demonstrate that the activity which is carried out by the petitioners though can be said to be organisation has resulted into a rendering of services with the help of the employees in the manner of trade or business in such an undertaking. Such evidence is lacking. Apart from this, what we find that the test as stated in this case appears to have been based on the basis of the observations of the Supreme Court in **Hospital's case (AIR-1960 SC 610 in the matter of State of Bombay v/s. Hospital Mazdoor Sabha)** and **Solicitor's case (AIR-1962, SC 1080 in the matter of N.U.C. Employees v/s. M. R. Meher)**. However, it will be revealed that this test has not been followed by the Apex Court considering the matter of **Sasidharan v/s. M/s. Peter & Karunakar & others** (1984 Lab.I.C. 1587), where the

question was as to whether lawyer's firm is a commercial establishment. In paragraph 13, the Apex Court observed as under:

> "An argument was strongly pressed upon us on the basis of the decision of this Court in Bangalore Water Supply and Sewage Board v/s. A. Rajapa AIR-1978 SC 548. The High Court has rightly observed that the question which arose in that case was entirely different namely, the sweep of the meaning of the word "industry". The ratio of that decision is that the term "industry" covers any activity which is systematically or habitually undertaken for the production or distribution of goods or for rendering material services to the community at large with the help of employees. The question which arises in this appeal is basically different, namely, whether a lawyers office of the office of a firm of lawyers is a commercial establishment. Considerations which were germane to the determination of the question in the Bangalore Water Supply case, are foreign to the decision of the question before us." (emphasis supplied by us.)

35. Thus, it will be seen that the real test as involved in the matter of **Dr. Devendra N. Surti v/s. The State of Gujarat AIR 1969 SC 63,** is getting support from the definition of "industry" and which was tried to be applied to decide the question as to whether doctor's dispensary is a commercial establishment. However, the said test

was discarded by the Apex Court in **V. Sasidharan v/s. M/s. Peter & Karunakar & others** (supra). It will be further found that in the matter of **N.E.Merchant v/s. The Bombay Municipal Corporation** (supra) the decision of Rabindra Nath v/s. First Industrial Tribunal (AIR-1963 CAL. 310) was discarded by the Division Bench of this Court while considering whether the office of Chartered Accountant or a Firm of Chartered Accountants is a commercial establishment. Not only that, but in **Narendra Keshichand Fuladi & Anr. v/s. The State of Maharashtra, (1986 Lab.I.C. 318**) also, the Division Bench of this Court has declined to apply the ratio of Bangalore Water Supply's case wherein the test was akin to that of Dr. Surati's case. Thus, it will be seen that consistently the Courts have refused to apply the tests which are applicable in respect of the definition of "industry" while deciding the scope of the definition of "commercial establishment". Therefore, we find it appropriate not to follow the test as laid down in Dr. Surati's case. We further record our finding that even if we apply the same test there is no material brought on record to demonstrate that the petitioners carried out the activity in the manner of trade or business,

at their premises at Ballard Estate, Mumbai.

36. There is one more point for not accepting the submissions of learned counsel. In **N.E.Merchant v/s. The Bombay Municipal Corporation 1967 Mh.L.J. 1008**, Justice Palekar while making a reference to the services of the articles clerks observed as under:

> ".....Every profession involves a good deal of mechanical or routine work. Notes are required to be prepared, summaries taken, and precedents collected. This work though, no doubt, necessary for a practitioner of a profession, is best left to assistants who play no part whatsoever in the individual judgment formed by the professional man and the advice he is prepared to offer. In that part of work of the profession which entirely depends upon the personal intelligence and skill of the professional practitioner, these assistants have really little to offer. The work done by these assistants merely eliminates the drudgery part of the profession..... But in the essential part of the professional business, the individual judgment or advice of the priest, the doctor and the lawyer alone is supreme, and in the formation of that judgment their assistants hardly play a recognizable part. That applies equally to the chartered accountant who has under him for training articled clerks. In the formation of the judgment and advice, the articled clerks have no place. Therefore, their co-operation with the Chartered Accountant in checking receipts and payments is not the sort of co-operation which will reduce what is essentially a profession to a commercial venture."

. These observations aptly apply to the case of the petitioners even if the strength of their employees is taken into consideration, because the main question of taking and giving advice and forming of a judgment for that purpose is to be done by the partners of the said firm and they are ultimately professionally responsible to their clients. Therefore, it cannot be said that the services rendered at the office of the petitioners is a result of the co-operation of the articled clerks and other staff employed by the petitioners.

37. Learned Associate Advocate General also relied upon 1975(3) SCC 64 in the matter of Federation of Indian Chambers of Commerce and Industry and submitted that the Apex Court has noted the similarity in the industry and commercial establishment and thereby there is a room to conclude that the establishment of the Chartered Accountants can be conducted in an organised and commercial manner. We reject the said submission because we have found that in the matter of **V. Sasidharan v/s. M/s. Peter & Karunakar & others 1984 LIC 1587 (SC)**, in paragraph 14 the Court has observed as :

> "14. In Indian Chambers of Commerce and Industry case (1974) 2 Lab LJ 271 the question was whether the Federation of Indian Chambers of Commerce and Industry is a commercial establishment within the meaning of the Delhi Shops and Commercial Establishment Act, 1954. This Court pointed out that the definition of "commercial establishment" in that Act is so wide that the activities of a registered society or a charitable trust would also fall within the purview of that definition."

. And, thus, the Court has not followed the said judgment so as to decide as to whether lawyers' firm is a commercial establishment or not. Even on the facts of the case, it will be revealed that it is a case in respect ofthe activities of the Indian Federation of Chambers of Commerce and not in respect of the professionals like that of the lawyers or Chartered Accountants.

38. Learned Associate Advocate General made a reference to **Kirloskar Consultants Ltd., V/s. Employees' State Insurance Corporation reported in (2001) 1 SCC 57** and submitted that the Apex Court has held that the establishment of the different professionals where the consultancy services are provided to the customers in respect of industrial,

technical, marketing and management activities and preparation of project reports by engaging the services of architects, engineers and other experts is a shop. We do not accept the said case to be the case governing the facts of the present case. Firstly, the professionals who have come together to provide the services, are from several professions, like architects, engineers, management consultants and financial consultants. Secondly, they were giving guidance and advice to other companies, corporations, boards and even local authorities on how best to manage their business for optimum utilisation of plant, machinery and other infrastructure. The nature of the activities of said establishment itself shows that it was a commercial activity wherein the trade and business has been carried out. We find that there are several distinguishing factors in the said reported case and the facts in our hand. Therefore, the said judgment is not applicable to the facts and circumstances of the present case. We find that the said fact of coming together of various professionals have been considered by the Apex Court for the Employees State Insurance Act, 1948 and not for the Shops and Establishments Act. Apart from that there are several distinguishing factors which

persuade us not to rely upon the said judgment.

39. Similarly, the reliance placed on (1992) 4 SCC 245 (in the matter of M/s. Cochin Shipping Co., v/s. ESI. Corporation), according to us is not proper, because the appellant in the said case was a registered company under the Companies Act engaged in the business of clearing and forwarding at the Port of Cochin situated in Willingdon Island and it was authorised to transact its business at the Cochin Custom House under the terms of Section 202 of the Sea Customs Act read with the rules made thereunder and licence was issued under the said Rules. Therefore, the findings recorded in respect of such office being the shop for the purposes of Employees' State Insurance Act, 1948 will not be applicable in the facts and circumstances of the present case.

40. However, the matter does not rest here. The Single Judge of this Court in the matter **R.S. Deshpande and another v/s. Municipal Corporation of Greater Bombay [1975 Mh.L.J. 160]** while considering the definition of "commercial establishment" has made a reference to the observations of Palekar, J. referred to above in respect of the learned

professions and observed that:

> ".. in order to qualify for being reckoned as liberal profession, a profession has to satisfy certain conditions, viz., that the activity carried on by it must not be an activity of a commercial nature as a trade or business. The main asset of professional man which he brings into the practice of his profession must be intellectual skill or manual skill controlled by intellectual skill. Apart from the skill there should be a degree of intelligence and integrity and above all the professional man should be member of an organised profession for admission to which high academic or professional qualifications are required and the professional organisation controls the admission to, the discipline in and removal from the profession on account of acts of indiscipline or misconduct. There must also be a code of professional ethics and in addition there must be a judicial remedy against exclusion from the profession on account of indiscipline or misconduct by the professional organisation."

> "Let us take the instance of the legal profession. There are well settled standards of conduct and etiquettes prescribed for the legal profession in India, England, United States and several other countries. An advocate is required to comport himself in a manner befitting his status as an officer of the court, a privileges member of the community, and a gentleman. He owes a duty to the Court consistent with independence, a duty to his client consistent with his duty to the Court and to the opponent and his advocate. The advocate also owes a duty to his opponent and his advocate. He also owes a duty to his profession and his colleagues who are its members. There are restrictions on his taking up other employment and a high professional

> rectitude is expected of him. The Bar Council of the State and the Bar Council of India are the professional organisations which control the admission to, the discipline in and punishment for misconduct in the profession. There is an appeal to the Supreme Court of India. Similarly, in the case of the medical profession, there are Medical Councils which control the admission to, the discipline in and punishable for misconduct in the profession. High academic or professional qualifications are prescribed for admission to the profession. It is due to the membership of these professional organisations and their control over its members that the public have come to repose great trust in the members of these professions. **It is only these ingredients that can make a profession a liberal profession.**"

. Applying this test to the Insurance Surveyor, the Single Judge concluded that it cannot be said to be a profession, much more a liberal profession.

41. We have made reference to the observations of the learned Single Judge, because after having referred to the requirement of time, as expressed by Justice Palekar (above), this Court has considered what are the requirements so as to treat any profession as a learned profession and for that purpose the learned Single Judge has analysed the structure and characteristics of the legal and medical professions. And, now looking to the

analysis, which Justice Palekar has carried out, it will be evident that high intelligence, calibre, skill and integrity is required on the part of the Chartered Accountants. Their profession is organised and controlled by the Institute of Chartered Accountants and their actions are scrupulously controlled and punished by the Institute, and, if necessary by the High Court. There is complete analysis made of the provisions of the said Act of 1949, duties to be performed by the Chartered Accountants under the Chartered Accountants Act, 1949 as well as under the Companies Act and Co-operative Societies Act. Therefore, but for making an observation that the profession of Chartered Accountants is a modern learned - liberal profession, every other analysis and the test has been considered by the Division Bench. We approve the test as has been observed by the learned Single Judge in the matter of **R.S. Deshpande and another v/s. Municipal Corporation of Greater Bombay [1975 Mh.L.J. 160]**, and applying the test we hold that the profession of the Chartered Accountants is one of the modern learned liberal professions like that of the Church, Medicine and Law.

42. On perusal of the various cases referred

to above, it is evident that the West Bengal Shops & Establishments Act, 1963 was amended by Act No. XVI of 1981 and the establishments of the legal practitioner and the Chartered Accountants were included into the definition of the commercial establishment. In the matter of **Dipti Kumar Bose v/s. Chief Inspector (Shops & Establishments) reported in 1986 Lab.I.C. 1718 Calcutta, (= 1986(1) CNN 50)** the question for consideration was whether the establishment of the legal practitioner was commercial establishment within the meaning of the West Bengal Shops and Establishments Act, 1963. Dealing with the said question, High Court held that the legal profession cannot be equated or placed on par with any other "shop or establishment" and the inclusion of the profession of the legal practitioner in the definition of the commercial establishment was unconstitutional and violative of Article 19(1)(g) of the Constitution of India. Relying upon the same judgment, Calcutta High Court in above referred unreported judgment [**Aurovinda Roychoudhury v/s. The Chief Inspector, Shops & Establishments & Others, in original writ petition no. 4615 of 1980, decided on 29th June 1990,**] concluded that the inclusion of the establishment of Chartered Accountants within the definition of

"commercial establishment" is violative of Constitutional safeguards and the same was declared ultra vires. It is pertinent to note that when the learned Single Judge of Karnataka High Court considered the same question as referred to above in the matter of **Phillipos & Co., and others v/s. The State reported in 1990 LAB.I.C. 427**, the learned Single Judge of Karnataka High Court also came to the finding that the Office of Chartered Accountant or a Firm of Chartered Accountants is not a "shop" or "commercial establishment" based on the reasonings given in the judgment of **Dipti Kumar Bose v/s. Chief Inspector (Shops & Establishments) reported in 1986 Lab.I.C. 1718 Calcutta, [= 1986(1) CNN 50**] and **V. Sasidharan v/s. M/s. Peter and Karunakar reported in 1984 Lab IC 1587.** Later on Justice K.T.Thomas (as he then was) the Judge of Kerala High Court while deciding the case **of P.K.Ramanathan v/s. The State of Kerala & Another [1991 Lab.I.C. 1408]** followed the said Karnataka High Court judgment and Bombay High Court judgment in the matter of N.E.Merchant v/s. Bombay Municipal Corporation [1967 Mh.L.J. 1008] and concluded that the office of the Chartered Accountant or a Firm of Chartered Accountants is not a "shop" and/or "establishment". The importance of these judgments

is that in each case the profession of Chartered Accountants was treated equally or similar to that of the profession of lawyers / Advocates. We find that the decisions were based on ratios which were applicable and which were decided in the matters of Advocates wherein the question considered was whether the Office of lawyer or a Firm of lawyers or Solicitors is a "commercial establishment".

43. One more aspect which is required to be considered and mentioned is that in Calcutta High Court case the efforts to include the lawyers or advocates along with the Chartered Accountants in the definition of "commercial establishment" were made in 1981 as it was made in Maharashtra by amending the similar provision of the Bombay Shops and Establishments Act, 1948, by the Amending Act of 1977, validity of which is under consideration in the light of Chartered Accountants.

44. It requires to be stressed that before the Calcutta High Court when such attempt was made in respect of the profession of Advocates or Lawyers in the matter of **Dipti Kumar Bose v/s. Chief Inspector (Shops & Establishments) reported in 1986 Lab.I.C. 1718 Calcutta, (= 1986(1) CNN 50)**, it was

held that the legal profession cannot be equated or placed on par with any other shop or establishment and the inclusion of the profession of legal practitioners was unreasonable, restrictive of and violative of Article 19(1)(g) of the Constitution of India and further said judgment was applied in the case of an Office of Chartered Accountant or a Firm of Chartered Accountants in the matter of **Aurovinda Roychoudhury v/s. The Chief Inspector, Shops & Establishments & Others,[In original writ petition no. 4615 of 1980, decided on 29th June 1990,** unreported judgment]. Thus, the Calcutta High Court treated the profession of Chartered Accountants similar to that of the Lawyers and Advocates and extended the same ratio in case of Chartered Accountants. Karnataka High Court while deciding the case of **Phillipos & Co., and others v/s. The State reported in 1990 LAB.I.C. 427**, followed the judgment of Calcutta High Court in the matter of **Dipti Kumar Bose v/s. Chief Inspector (Shops & Establishments) reported in 1986 Lab.I.C. 1718 Calcutta, (= 1986(1) CNN 50)**. The said Karnataka High Court judgment was followed by the Kerala High Court when it decided the case of **P.K.Ramanathan v/s. The State of Kerala & Another [1991 Lab.I.C. 1408]** wherein the same question

pertaining to the office of a Chartered Accountant was involved. This shows that the High Courts of Calcutta, Karnataka and Kerala have treated the profession of law and Chartered Accountants at par and have not included the office of Chartered Accountant or a Firm of Chartered Accountants within the definition of a "shop" or "commercial establishment."

45. Relying upon this aspect, the learned counsel appearing on behalf of the petitioners, therefore, has emphasised that the judgment of **N.E.Merchant v/s. The Bombay Municipal Corporation (1967 Mh.L.J. 1008)** case pertaining to the Chartered Accountants was decided by the Division Bench of this Court relying upon Sakharam v/s. City of Nagpur Corporation (AIR 1964 Bom. 200). Similarly, the present case of the petitioners pertaining to the Chartered Accountants be decided relying upon **Narendra K. Fulladi & Ano. v/s. State of Maharashtra reported in 1986 LIC 318**, wherein the amending Act of 1977 was declared ultra-vires so far as legal practitioners inclusion in the definition of "commercial establishment" is concerned, as was done by the Calcutta High Court in the case of amendment effected in the year 1981 in

the West Bengal Shops & Establishments Act, 1964, as discussed above.

46. We find substance in the submission made by the learned counsel for the petitioners. It requires to be mentioned that one of the grounds upon which the amending Act of 1977 was challenged in **Narendra K. Fulladi & Ano. v/s. State of Maharashtra reported in 1986 LIC 318**, was that the class of legal practitioners does not partake all the attributes of the business, commerce or trade which was necessary for bringing them under the definition of "commercial establishment" and in view of the avowed object of the Act, as originally framed, the inclusion of the legal practitioners in the definition was arbitrary and irrational and was therefore violative of Article 14 of the Constitution. The Bench observed in paragraph 11 as under:

> "We are satisfied that there can be no challenge merely on the ground of enlargement of the meaning of the word "commercial establishment", once the competency of the Legislature is conceded. However, in none of the cases on which the reliance was placed on behalf of the respondent did the question of violation of Article 14 came up for consideration as has been argued before us."

. The Bench further found that even though Sakharam Narayan Kherdekar's case (referred to above) was based on the decision in N.U.C. Employees V/s. M.R.Meher (AIR 1962 SC 1080), i.e., the Solicitor's case, which was found to be incorrect in view of the discussion in Bangalore Water Supply & Sewerage Board v/s. A.Rajappa (AIR 1978 SC 548), yet those cases are not applicable in the present context, because in those cases the question under consideration was in respect of application of the definition of "industry" from the Industrial Disputes Act, and not a definition of commercial establishment. The Division Bench observed that:-

> "We find that the concept of commercial establishment is very much different from the concept of industry and whatever may have been said in respect of 'industry' cannot be imported while considering the width, nature and the extent for the concept of 'commercial establishment'. In this view which we are taking, we are supported by the observations made by the Kerala High Court in Sasidharan v/s. Peter and Karunakaran, 1978 Lab IC 1614."

. The Bench ultimately relied upon the observations of the Supreme Court In re The Special

Courts Bill 1978 AIR 1979 SC 478 that:

> "By the process of classification, the State has power of determining who should be regarded as a class for the purposes of the legislation and in relation to a law enacted on a particular subject. This power, no doubt, in some degree is likely to produce some inequality; but if a law deals with the liberties of a number of well defined classes, it is not open to the charge of denial of equal protection on the ground that it has no application to other persons. Classification thus means segregation in classes which have a systematic relation, usually found in common properties and characteristics. **It postulates a rational basis and does not mean herding together of certain persons and classes arbitrarily.** (emphasis supplied).

The law can make and set apart the classes according to the needs and exigencies of the society and as suggested by experience. It can recognise even degree of evil, but the classification should never be arbitrary, artificial or evasive.

The classification must not be arbitrary but must be rational, that is to say, it must not only be based on some qualities or characteristics which are to be found in all the persons grouped together and not in others who are left out but those qualities or characteristics must have reasonable relation to the object of the legislation. In order to pass the test, two conditions must be fulfilled, namely, (1) that classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others and (2) that that differentia must have a rational relation to the object sought to be achieved by the Act.

The differentia which is the basis of the

> classification and the object of the Act are distinct things and what is necessary is that there must be a nexus between them. In short, while Article 14 forbids class discrimination by conferring privileges or imposing liabilities upon persons arbitrarily selected out of a large number of other persons similarly situated in relation to the privileges sought to be conferred or the liabilities proposed to be imposed, it does not forbid classification for the purpose of legislation, provided such classification is not arbitrary in the sense above mentioned."

. Relying upon the above paragraphs, the Division Bench further observed and found that:

> "We have already pointed that there are no common properties or characteristics to be found in the other commercial establishments and the establishment of a legal practitioner which have been herded together. There is no rational basis for herding them together and the conclusion that they were brought together arbitrarily, is inescapable. The differentia must be intelligible and must be reasonably related to the object of the law. The herding up, which is done either arbitrarily or irrationally would, ex facie, be unreasonable. We are therefore, clear that the inclusion of the establishment of a legal practitioner in the context of the connotation of commercial establishment, to which we have already adverted, does not answer the test of reasonableness and the inclusion would, therefore, be violative of Article 14 of the Constitution on the ground of unreasonableness."

. And, thus struck down the amending Act, Maharashtra Act LXIV of 1977 to the extent of Legal

Practitioner.

47. We have already noted that the office of Chartered Accountant or a Firm of Chartered Accountants is a profession - learned and liberal profession - like that of the lawyers and advocates. Therefore, naturally we also find that so far as the office of the Chartered Accountant or a Firm of Chartered Accountants is concerned, the observations made by the Division Bench above are equally applicable and that the office of Chartered Accountant or a Firm of Chartered Accountants cannot be herded together with the shops and restaurants, etc., as is reflected in the definition of the "commercial establishment".

48. We find that earlier to the amending Act, in view of the decision in **N.E.Merchant v/s. The Bombay Municipal Corporation (1967 Mh.L.J. 1008)** the office of Chartered Accountant or a Firm of Chartered Accountants was not included in the definition of "commercial establishment" and the same was opinion of the Government also, and, therefore, in the object clause of the Amendment Bill it was stated that the inclusive clause has been put up because some of the Courts have held

that the establishment of lawyers and Chartered Accountants is not a "commercial establishment". As it is evident that herding of lawyers along with other commercial establishments is impermissible, equally the herding of Chartered Accountants along with other commercial establishments is impermissible. We therefore find that the inclusion of the office of Chartered Accountants or a Firm of Chartered Accountants in the definition of "commercial establishment" is impermissible and violative of Article 14 of the Constitution being arbitrary and irrational one. We follow the test laid down in **Narendra K. Fulladi & Ano. v/s. State of Maharashtra reported in 1986 LIC 318** and hold that the said amending Act of 1977 is ultra-vires to the Constitution insofar as inclusion of Chartered Accountants in the definition of "commercial establishment" is concerned.

49. Learned Associate Advocate General has pointed out the various provisions of the Act, as discussed in the arguments above, to demonstrate that different class of persons have been differently treated by the Act by incorporating the separate chapters and provisions. He submitted that therefore it is not herding together. We are not in

agreement with the learned Associate Advocate General. We have carefully gone through the various Chapters of Bombay Shops and Establishments Act, 1948 and we have found that there is no separate Chapter or provision specifically dealing with the Chartered Accountants as was shown in respect of tax practitioners, but for the inclusion of Chartered Accountants in the definition of "commercial establishment". Chapter-I of the said Act provides for registration of establishments. Chapter-II provides for hours of work, Chapter-III for holidays and leave, Chapter-IV for wages, Chapter-V for employment of children and women and Chapter-VI for health and safety measures. Section 6 of the Act provides that no employee in any establishment shall be required or allowed to work for more than 8 hours on any day or for more than 48 hours in any week. Section 8 requires that the period of work of an employee in an establishment for each day shall be so fixed that no period shall exceed four hours and no such person shall work for more than 4 hours before he has had a interval for races of at least 1 hour. Under section 10 no establishment shall on any day be opened earlier than and closed later than such hours as may be fixed by the Government, provided that any customer who is being served or is

waiting to be served in any establishment at the hours fixed for its closing may be served during a quarter of an hour immediately following such hour. These and other cognate provisions of the Act show that the Office of the Chartered Accountant or a Firm of Chartered Accountants cannot be comprehended within these provisions. Thus we are on the contrary satisfied that the office of Chartered Accountant and/or a Firm of Chartered Accountants has been treated at par with shops and restaurants, etc., and the premises of Chartered Accountant in practice will be governed by the said provisions. In fact, the working hours of the office of Chartered Accountant or a Firm of Chartered Accountants cannot be regarded like that of shop or establishment. It will be difficult to maintain relation and entertain clients by the Chartered Accountants. Therefore, taking into consideration the total service rendered by Chartered Accountants and their relation with clients, the Office of Chartered Accountant or a Firm of Chartered Accountants cannot be regarded as like shop or commercial establishment. We are satisfied that the Division Bench when considered this aspect was also satisfied that simply inclusion has resulted into herding together the wrong class of persons and

therefore in Narendra Fulladi's case said provision was struck down. While providing a inclusion of Chartered Accountants in the definition of "Commercial establishment", the care should have been taken to see that the profession of accountant, chartered accountants falls in the category of commercial activity so that it can be said to be a commercial establishment. The activity which is not commercial basically, cannot be included in the definition of "commercial establishment" by simple amendment of definition providing inclusion . Basically, profession must have characteristics of commercial trace activities so as to bring them together class as such. Viewed from this point of view and tests, it will be found that submission of the learned counsel for the State is without merit.

50. The challenge in main petition is directed as against the constitutional validity of section 24 of the Bombay Shops and Establishments Act, 1948 and Bombay Shops and Establishments Amendment Act, 1977 so far as it seeks to include the establishment of accountants within the definition of "commercial establishment" and all the grounds raised in the petition are in this respect, though in the cause-title of the petition section

482 of the Code of Criminal Procedure is/was stated. However, in the absence of rasing of a ground, at eleventh hour, the learned counsel for the petitioners tried to raise grounds in respect of the maintainability of the complaints being filed as against all the partners of the petitioners, etc., as could have been considered in a petition under section 482 of the Code of Criminal Procedure. However, since the main petition does not contain any ground in this respect, we refuse to entertain and consider those grounds which are raised at eleventh hour by the petitioners.

51. Shri. Walawalkar learned counsel appearing on behalf of the respondent - BMC relied upon an order dated 1.2.1990 passed in Writ Petition No. 234 of 1990 in the matter of Matru Sewa Sangh v/s. State of Maharashtra. However, it is a case of a summary rejection of the petition in the case of hospitals. The same being not the judgment, we refused to consider it.

52. In view of the above discussions we are of the view that the amendment so far as it relates to the establishment of the chartered accountants is liable to be struck down as it herds together

commercial establishments with the establishment of the Chartered Accountants, which herding together is irrational and arbitrary.

53. In the result, petition is allowed in the following terms.

Provisions of the Amending Act, viz., Maharashtra Act 64 of 1977, in so far as that include establishment of Chartered Accountant / Accountants within the definition of "commercial establishment" in Section 2(4) of the Bombay Shops & Establishments Act, 1948 (Bombay Act No. LXXIX of 1948) are unconstitutional and they are struck down.

The proceedings of Criminal Case No. 53/SCM/1995 registered before the Special Metropolitan Magistrate, Esplanade Court against the petitioners are hereby quashed.

Rule made absolute.

There shall be no order as to costs.

(S.R.SATHE,J.) **(S.B.MHASE,J.)**